No. 14-1507

In The
Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, Director, North Dakota Department of Transportation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

North Dakota, like many other states, makes it an offense for a motorist, who has been arrested for driving under the influence, to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The North Dakota Supreme Court held that the refusal statute does not violate a driver's rights under the Fourth Amendment. The question presented is:

Whether North Dakota's implied-consent laws and refusal statute violate a motorist's rights under the Fourth Amendment when the motorist either consents to a chemical test or refuses to submit to a test and no test is administered.

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JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with the constitutional provision contained in the Petition. The Respondent also agrees with the statutory provisions contained in the Petition but adds the following:

North Dakota law, N.D.C.C. § 39-20-01 (2013) provides in relevant part:

> 1. Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath or urine. As used in this chapter, the word "drug" means any drug or substance or combination of drugs or substances which renders an individual incapable of safely driving, and the words "chemical tests" or "chemical analysis" mean any test to determine

the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, approved by the director of the state crime laboratory or the director's designee under this chapter.

2. The test or tests must be administered at the direction of a law enforcement officer only after placing the individual, except individuals mentioned in section 39-20-03, under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest.

3. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a

> minimum of one hundred eighty days and up to three years of the individual's driving privileges. The law enforcement officer shall determine which of the tests is to be used.

STATEMENT OF THE CASE AND FACTS

On August 10, 2013, at approximately 9:00 p.m., a Bowman Police Officer responded to a report of a suspicious vehicle in an individual's yard. While searching for the vehicle that had left the property, the officer observed a vehicle matching the reported description.

The police officer observed the vehicle nearly hit a stop sign while making a right hand turn into a driveway. The vehicle then stopped, partially in the roadway.

The officer pulled up behind the vehicle without activating the patrol car's emergency lights and walked up to the driver's side of the vehicle to make sure everything was fine with the individual and to see what was going on. Upon making contact with the motorist, later identified as Beylund, the officer observed an empty wine glass in the center console and an odor of an alcoholic beverage coming from inside the vehicle. Beylund's eyes were red and his speech was slurred.

Because the vehicle was partially sitting on the roadway, the officer activated his yellow amber lights

as a caution to other motorists. The officer then had Beylund pull his vehicle forward so it would be off the roadway.

After attempting to administer the horizontal gaze nystagmus test, which Beylund would not complete, the officer informed Beylund of the implied-consent advisory and requested he submit to an onsite screening test. Beylund attempted to blow into the onsite screening device at least three times but he did not give a proper air sample.

The officer arrested Beylund for driving under the influence of alcohol. Although he did not get a test result on the onsite screening test, the officer did not consider Beylund's lack of performance to be a refusal.

The officer asked Beylund to submit to a blood test at the Bowman hospital where he again informed Beylund of the implied-consent advisory including the provision that if he refused he would be charged with a crime. Beylund agreed to submit to a chemical test of his blood. The result of the blood test established Beylund had a blood alcohol concentration of 0.25% by weight.

On appeal to the district court, the district court affirmed the hearing officer's decision, finding Beylund's reliance on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) to be unpersuasive, and found Beylund voluntarily consented to the chemical breath test. The district court also found that North Dakota's chemical test refusal statute, as a stand-alone factor, did not

render Beylund's consent to a chemical test coerced. Assessing the totality of the circumstances, the district court was unpersuaded that Beylund was coerced into consenting to the chemical test.

The North Dakota Supreme Court reviewed and concluded Beylund voluntarily consented to the chemical blood test. The court relied on its earlier decision in *State v. Birchfield*, 858 N.W.2d 302 (N.D. 2015), *pet. for cert. filed*, No. 14-1468 in ruling that the state's implied-consent law and refusal statute were not coercive. The court further determined that North Dakota's implied-consent law did not violate the unconstitutional conditions doctrine. *Beylund v. Levi*, 859 N.W.2d 403, 414 (N.D. 2015).

Beylund requests this Court grant certiorari in *Bernard v. Minnesota*, No. 14-1470, and *Birchfield v. North Dakota*, No. 14-1468, and requests his petition be held pending the decision of those two cases. Pet. 3. Beylund cites the reasons described in the *Birchfield*[1]

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[1] The *Birchfield* petitioner asserts that the North Dakota Supreme Court relied on the Minnesota intermediate appellate decision in *State v. Bernard*, 844 N.W.2d 41 (Minn. Ct. App. 2014), for the proposition that the criminal-refusal statute is constitutional whenever an officer could have secured a warrant. *Birchfield* Pet. 5. That is not correct. This same argument was made in a subsequent case before the North Dakota Supreme Court and the court explained, "our decision in *Birchfield* was not based solely on the Minnesota Court of Appeals decision in *Bernard*." *State v. Kordonowy*, 867 N.W.2d 690, 693 (N.D. 2015). The North Dakota Supreme Court here was simply setting out the Minnesota appellate court's reasoning.

petition as the reasons for granting certiorari in his case. Pet. 3. For this reason Respondent will limit its response to the Petition in *Birchfield*.

REASONS FOR DENYING THE PETITION

In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), this Court said that "States have a broad range of tools to enforce their drunk-driving laws and to secure [Blood Alcohol Content] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566. The very first example the Court offered was "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* And, of particular relevance here, the Court explained that "[s]uch laws impose significant consequences when a motorist withdraws consent," such as revoking the driver's license and using "the motorist's refusal to take a BAC test as evidence against him in a subsequent criminal prosecution." *Id.* Every State has enacted such a law, and these laws have long withstood legal attack. *Id.* (citing *South Dakota v. Neville*, 459 U.S. 553 (1983)).

In 13 States, the "significant consequence[ ]" of a motorist's withdrawal of consent, after he is arrested on probable cause of committing a drunk-driving offense, is that the withdrawal is an independent misdemeanor offense, unless it is for a fourth violation

of N.D.C.C. § 39-08-01.[2] Some motorists have challenged those laws, but the appellate courts – spanning cases before and after *McNeely* – have uniformly rejected those challenges. This Court's intervention is therefore not needed, and certiorari is not warranted.

I. The North Dakota Supreme Court's decisions in *Beylund* and *Birchfield* do not conflict with any decisions by other state or federal appellate courts.

The *Birchfield* petitioner tries to create the specter of a conflict among the Courts (*Birchfield*, Pet. 11), but as his counsel concedes in the reply brief in *Bernard v. Minnesota*, No. 14-1470 (filed June 16, 2015), no direct conflict exists. *See* Reply Brief, *Bernard v. Minnesota*, No. 14-1470, at 5 (Minnesota's "observ[ation] that there is no square conflict" is "correct"); *id.* at 6 ("Even absent a direct conflict in the lower courts, these erroneous rulings should be corrected by this Court."); *id.* ("[E]xpress conflict or not, ").

The reason for counsel's concession is plain: All the appellate courts that have addressed challenges

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[2] The *Birchfield* petitioner asserts that "[a] first refusal to consent to a chemical test qualifies as a misdemeanor under N.D.C.C. § 39-08-01(1), while subsequent offenses may qualify as a felony." *Birchfield*, Pet. 3. That statement does not fairly convey how the law operates. Under N.D.C.C. § 39-08-01(4), first and second violations under § 39-08-01 in a seven-year period are class B misdemeanors, a third offense in a seven-year period is a class A misdemeanor, and only a fourth and subsequent offense is a class C felony.

to laws similar to North Dakota's implied-consent and criminal-refusal statutes have rejected them. For example, in *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *pet. for cert. filed*, No. 14-1470, the Minnesota Supreme Court upheld Minnesota's refusal statute. After police arrested Bernard for driving while impaired, he refused to take a breath test. Bernard alleged that Minnesota's test-refusal statute violated substantive due process and the Fourth Amendment, but the court disagreed. The court reasoned that a breath test of Bernard would have fallen within the search-incident-to-arrest exception of the Fourth Amendment. *Id.* at 766. The court then rejected Bernard's substantive due process claim, ruling that because a warrantless search of Bernard's breath incident to his arrest would have been constitutional, he had no fundamental right to refuse a constitutional search. *Id.* at 773.

1. The Ninth Circuit and the intermediate courts of appeals of Alaska, Hawaii, and Virginia have reached the same conclusion. The Alaska Court of Appeals and the Ninth Circuit both addressed a challenge by one Peter Burnett to Alaska's criminal-refusal statute. Burnett pleaded no contest to a charge of refusing a breathalyzer test, but reserved the right to challenge the constitutionality of the statute on appeal. On direct review, the Alaska Court of Appeals rejected his challenge after concluding that a breathalyzer is a reasonable search incident to arrest. *Burnett v. Municipality of Anchorage*, 678 P.2d 1364 (Ala. Ct. App.), *cert. denied*, 469 U.S. 859 (1984). The Ninth Circuit later rejected Burnett's request for

habeas relief, holding that there is no Fourth Amendment right to refuse to submit to testing. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986). The court stated, "No rights were relinquished here, however, because there is no Fourth Amendment right to refuse a breathalyzer examination." *Id.* at 1450.

The Hawaii Court of Appeals upheld that state's criminal-refusal statute in *State v. Yong Shik Won*, 332 P.3d 661 (Haw. Ct. App.), *cert. granted*, *State v. Yong Shik Won*, 2014 WL 2881259 (Haw. June 24, 2014). The court reasoned that, "[i]n balancing the government's interest against the individual's privacy interest, . . . obtaining a driver's breath test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment." 332 P.3d at 681.

Likewise, the Virginia Court of Appeals rejected a constitutional challenge to its criminal-refusal statute, Va. Code Ann. § 18.2-268.3. *See Rowley v. Commonwealth*, 629 S.E.2d 188 (Va. Ct. App. 2006). The court recognized the general rule that a search authorized under an implied-consent statute is valid: "The general rule applies here because Rowley, like all drivers, consented to submit breath samples by exercising the legal privilege of driving on the Commonwealth's roads." *Id.* at 191. Agreeing with *Burnett*'s conclusion that there "is no Fourth Amendment right to refuse a breathalyzer examination," the court held that it follows that there is "no Fourth Amendment violation in punishing a DUI suspect for refusing

to provide a breath sample under Code § 18.2-268.3." *Id.* (quoting *Burnett*, 806 F.2d at 1450).

Finally, the Ohio Supreme Court rejected a Fourth Amendment challenge to a similar statute, Ohio Rev. Code § 4511.19(A)(2), which increased the criminal penalty that may be imposed for driving under the influence if the motorist refused to submit to a chemical test. *See State v. Hoover*, 916 N.E.2d 1056, 1060-1061 (Ohio 2009), *cert. denied*, 559 U.S. 1093 (2010). The Ohio Supreme Court, noting that "the request to submit to a chemical test does not occur until after probable cause to arrest exists," held that the statute does not violate the Fourth Amendment. *Id.* at 1061.

2. In *Beylund*, the North Dakota Supreme Court held, N.D.C.C. §§ 39-08-01(1)(e) and 39-20-01 do not unconstitutionally coerce consent. Beylund exclusively relies on the petition in *Birchfield*, yet neither he nor the *Birchfield* petitioner alleges any coercive circumstances other than the penalties under North Dakota law.[3] In *State v. Brooks*, 838 N.W.2d 563

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[3] Beylund requests his Petition be held pending the disposition of *Birchfield v. North Dakota*, No. 14-1468 and *Bernard v. Minnesota*, No. 14-1470 and notes his Petition along with several others currently before this Court all present a question of whether a state may criminalize a refusal to consent to a chemical test of the person's blood, breath, or urine. Pet. 3. In this case, and in the following cases, the motorists were found to have consented to chemical tests and their Fourth Amendment rights were not implicated: *Culver v. Levi*, 861 N.W.2d 172 (N.D. 2015), *pet. for cert. filed*, No. 14-1508; *State v. Harns*, 861 N.W.2d 173

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(Minn. 2013), a post-*McNeely* opinion, the Minnesota Supreme Court addressed the question whether police violated Brooks' Fourth Amendment rights when they took blood and urine samples from him without a search warrant. This Court had previously granted a writ of certiorari in *Brooks* and remanded the case back to the Minnesota state court for consideration in light of this Court's decision in *McNeely*. *See Brooks v. Minnesota*, 133 S. Ct. 1996 (2013).

In *Brooks*, the police officer provided the driver with Minnesota's implied-consent advisory, which includes the advisory that refusal to submit to chemical testing is a crime. Although Brooks consented to the chemical testing, he argued his consent was unlawfully coerced because of Minnesota's refusal statute, *i.e.*, that if he refused to submit to testing, he could be charged with a crime and, therefore, his consent was not valid. *Brooks*, 838 N.W.2d at 570.

The Minnesota Supreme Court in *Brooks*, like this Court in *McNeely*, looked to the Court's Fifth Amendment case, *Neville*, and one of its own Fifth Amendment cases, *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991), in its Fourth Amendment analysis:

> *Neville* and *McDonnell* examine the issue of coercion within the context of the Fifth Amendment privilege against self-incrimination. But the question in both cases was whether

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(N.D. 2015), *pet. for cert. filed*, No. 14-1512; and *Wojahn v. Levi*, 861 N.W.2d 173 (N.D. 2015), *pet. for cert. filed*, No. 15-129.

> the existence of a consequence for refusing to take a chemical test rendered the driver's choice involuntary. *See Neville*, 459 U.S. at 562-63, 103 S.Ct. 916; *McDonnell*, 473 N.W.2d at 855-56. We address the same question in the context presented here when we examine whether Brooks's consent was voluntary, as the State argues, or whether it was coerced, as Brooks argues. *See Harris*, 590 N.W.2d at 102 (Minn. 1999) (explaining that consent to search becomes involuntary when the encounter with police becomes "coercive"). *Based on the analysis in Neville and McDonnell, a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test.*

Brooks, 838 N.W.2d at 570 (footnote omitted) (emphasis added).

As in *Brooks*, here Beylund was given the option of taking or refusing the requested chemical test, and he voluntarily agreed to submit to the test. No improper coercion was used. The North Dakota Supreme Court correctly concluded "consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer's reading of the implied-consent advisory that accurately informs the arrestee of the consequences of refusal, including the administrative and criminal penalties, and presents the arrestee with a choice." *Birchfield*, 858 N.W.2d at 306.

The Wisconsin Court of Appeals has also held true statements from a law enforcement officer do not constitute coercion.

> However, the arresting officer, by reading the informing the accused form, simply stated the truth: If Walitalo refused to submit to a chemical test, his driving privileges would be revoked. This statement did not involve any deceit or trickery, but instead accurately informed Walitalo of his precise legal situation. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 8.2(c) at 653-52 (3d ed. 1996). While police cannot use deceit or trickery, they are entitled to make true statements.

Vill. of Little Chute v. Walitalo, 650 N.W.2d 891, 894 (Wis. Ct. App. 2002).

"Where, as here, consent is obtained after informing a driver of actual legal consequences, the consent, if freely given, is valid. The accurate statement would not involve deceit. Police cannot use deceit, but they are entitled to make truthful, accurate statements." *City of Kingman v. Lubbers*, 65 P.3d 1075, 1077 (Kan. App. 2003).

In the end, the only purported "conflict" the *Birchfield* petitioner can muster is different reasoning used by the lower courts in reaching the same conclusion. But "[t]his Court reviews judgments, not statements in opinions," *Camreta v. Greene*, 131 S. Ct. 2020, 2037 (2011) (internal quotation marks omitted), and the judgments have been uniform. Implied-consent and criminal-refusal laws are a longstanding part of the States' legal landscape, and their validity is well established. There is no need for this Court's intervention.

II. The North Dakota Supreme Court's decisions in *Birchfield* and *Beylund* do not conflict with any decisions by this Court.

In the end, both Beylund and the *Birchfield* petitioner seek this Court's review because they disagree with the North Dakota Supreme Court's decisions. Even if that were a sufficient basis for certiorari – and it is not – it would not justify review. The North Dakota Supreme Court's decisions are consistent with this Court's precedents interpreting the Fourth Amendment.

1. The *Birchfield* petitioner contends the lower court's ruling would essentially read *McNeely* "off the books." *Birchfield*, Pet. 10. That incorrectly characterizes that decision. In *McNeely*, this Court held the natural metabolization of alcohol in the blood stream does not present a *per se* exigency that "justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. Rather, the "exigency . must be determined case by case based on the totality of the circumstances." *Id.* *McNeely*'s holding is therefore straightforward and limited – it applies only to driving-under-the-influence cases in which law enforcement, without obtaining a warrant and absent an exigency based on the totality of the circumstances, compels chemical testing after an individual has refused to submit to chemical testing.

The Court recognized, however, that "drunk driving continues to exact a terrible toll on society"

and provided reassurance that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." 133 S. Ct. at 1565-1566. In particular, the Court pointed to the fact that

> all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent. . . .

133 S. Ct. at 1566 (citations omitted). Nowhere in *McNeely*, therefore, did this Court hold or suggest that implied-consent refusal laws are unconstitutional or that a State may not sanction a motorist who withdraws the consent he had impliedly given.

Leaving the North Dakota Supreme Court's decision in place would not result in "sweeping warrantless searches" (*Birchfield*, Pet. 8) because, as the court recognized, "[i]f a person refuses to submit to testing under section 39-20-01 . . , none may be given." *Birchfield*, Pet. App. 4a. Once the person withdraws his implied consent, no search may be conducted (absent an exigency). And beyond that, the North Dakota law applies only to persons who have been arrested based on probable cause to believe they are driving under the influence – a limitation *Birchfield*'s petition often ignores. *E.g.*, *Birchfield*, Pet. 7

("the question [is] whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search").

For similar reasons, the *Birchfield* petitioner's reliance on *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523 (1967), is misplaced. *Camara* addressed a provision of a local housing code that authorized all city employees to enter "any building, structure, or premises in the [c]ity" and made it a crime to refuse such entry. *Id.* at 526-527 (quoting § 503 of San Francisco Housing Code). As the North Dakota Supreme Court correctly recognized (Pet. App. 12a-13a), *Camara* is distinguishable in multiple ways.

The regulation at issue in *Camara* applied even where government officers lacked any suspicion of wrongdoing; it allowed for suspicionless searches of every building in the city. *Id.* at 526. In addition, that regulation did not involve motor vehicles, which are "the subject of pervasive regulation by the State"; "[e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York v. Class*, 475 U.S. 106, 113 (1986). Further, "[u]nlike the regulation in *Camara*, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." Pet. App. 13a.

2. In order for consent to be voluntary, it cannot be the product of any "duress or coercion, express or

implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). But this Court is not troubled by providing motorists arrested for driving under the influence with a hard choice. "[T]he criminal process often requires suspects and defendants to make difficult choices." *Neville*, 459 U.S. at 564. Because the State's "offer of taking a blood alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *Id.* at 563.

The test of voluntariness is whether a defendant's will has been "overborne" or his "capacity for self-determination critically impaired." *Id.* at 225. "Voluntariness is not, however, 'to be equated with the absolute absence of intimidation,' for under this test virtually no statement would be voluntary." *United States v. Pelton*, 835 F.2d 1067, 1072 (4th Cir. 1987).

"Truthful statements are not the type of 'coercion' that threatens to render a statement involuntary. As the Supreme Court has observed, no statements would qualify as voluntary under such a standard, for 'very few people give incriminating statements in the absence of official action of some kind.'" *Pelton*, 835 F.2d at 1073 (quoting from *Schneckloth*, 412 U.S. at 224). Beylund did not testify at the administrative hearing that he felt coerced into submitting to the blood test due to law enforcement's reading of the implied-consent advisory. Therefore, this Court lacks jurisdiction to address this issue

because Beylund did not properly raise a factual basis for this argument.

3. Beylund and the *Birchfield* petitioner also argue that North Dakota's refusal statute violates the unconstitutional conditions doctrine. Pet. 4; *Birchfield*, Pet. 9. In *Beylund*, the North Dakota Supreme Court recognized that whether North Dakota's implied-consent law represents an unconstitutional condition was an issue of first impression. 859 N.W.2d at 410. After first addressing the doctrine, the state court noted this Court has not applied the unconstitutional conditions doctrine to the Fourth Amendment. *Id.* Then relying on this Court's opinion in *McNeely* and several other state court decisions the court "conclude[d] North Dakota's implied consent law as challenged, either on its face or as applied, does not violate the Fourth Amendment of the United States Constitution applying either general Fourth Amendment principles or under the doctrine of unconstitutional conditions." 859 N.W.2d at 414.

Beylund does not present any legal authority that would alter the North Dakota Court's analysis in *Beylund*, and in any event, Beylund's unconstitutional conditions argument lacks merit. Again, this Court in *McNeely* approvingly discussed state laws that "impose serious consequences when a motorist withdraws [the] consent" he impliedly gave to BAC testing, including making "an adverse inference" against the motorist "in a subsequent criminal prosecution." 133 S. Ct. at 1556 (citing *Neville*, 459 U.S. at 563-564). The *Birchfield* petitioner fails to explain why

that "serious consequence" is permissible yet the "serious consequence" North Dakota and 12 other States impose is not.

The unconstitutional conditions doctrine – which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013) – is therefore inapplicable. For the *Birchfield* petitioner to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he impliedly consented to it when he obtained his driver's license. He cannot do so here.

And even if the *Birchfield* petitioner could show he had a constitutional right to refuse the test, his argument would still fail. The government may impose a condition where, as here, it has a "vital interest in doing so." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980)). This Court has repeatedly recognized the States' interest in public safety in removing drunk drivers from their highways. *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing that the interest in public safety is substantially served by summary suspension of driver's license by those who refuse to be tested upon arrest); *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); *McNeely*, 133 S. Ct.

at 1565 ("[D]runk driving continues to exact a terrible toll on our society."). North Dakota's implied-consent and refusal statutes further its vital interest in removing drunken drivers from the road.

North Dakota's implied-consent and refusal statutes are also consistent with this Court's repeated recognition that there are often consequences for not participating in searches. In *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004), this Court held that a State does not violate the Fourth Amendment by criminally punishing individuals for passively or nonviolently refusing to provide their identities to the police during a valid *Terry* stop. *Id.* at 189 (noting that "[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity"). States may also compel an individual to stand in a lineup or wear particular clothing, or to produce incriminating non-testimonial evidence such as a blood sample, handwriting exemplar, or voice exemplar. *Doe v. United States*, 487 U.S. 201, 210 (1988). And in *Neville*, the Court permitted the State to use an individual's refusal to cooperate with such requests as evidence of the individual's guilt. *Neville*, 459 U.S. at 566.

North Dakota's statutory scheme fits well into this line of cases. Ultimately, "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for the suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Id.* at 564.

III. There is no pressing need for this Court to resolve the question presented.

The *Birchfield* petitioner's last ground for why this Court should grant certiorari is that state test-refusal statutes are applied with considerable frequency and may impact hundreds of thousands of convictions each year. *Birchfield*, Pet. 12. The frequency of a *constitutional* practice, however, is not cause for concern. And so Birchfield's "importance" argument amounts to a repeat of his error-correction argument, namely, that the various appellate courts to have addressed criminal-refusal statutes have all gotten it wrong. As shown above, however, they have not. That these statutes are applied frequently thus shows merely that they are operating as they were designed to operate. And the fact that some other States are considering legislation that would impose similar criminal penalties shows only that protecting citizens from drunk driving remains a large concern throughout the country, and that implied-consent and refusal laws are considered a fair and reasonable way to accomplish that objective.

CONCLUSION

The Petitioner does not present compelling reasons for this Court to grant the petition. Accordingly, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted this 24th day of September, 2015.

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